

**UNIVERSITY OF
LEADING
THE WAY
WESTMINSTER** 

WestminsterResearch

<http://www.westminster.ac.uk/research/westminsterresearch>

Youth Justice Reform: Redressing Age Discrimination against Children?

Simon Flacks

University of Vienna (Westminster Law School, University of Westminster)

This is the author's accepted version of an article published in Youth Justice (April 2012), 12:1, 19-35, doi: <http://dx.doi.org/10.1093/bjc/azt066>

The published version is available at:

<http://dx.doi.org/10.1093/bjc/azt066>

The WestminsterResearch online digital archive at the University of Westminster aims to make the research output of the University available to a wider audience. Copyright and Moral Rights remain with the authors and/or copyright owners.

Whilst further distribution of specific materials from within this archive is forbidden, you may freely distribute the URL of WestminsterResearch:

(<http://westminsterresearch.wmin.ac.uk/>).

In case of abuse or copyright appearing without permission e-mail repository@westminster.ac.uk

Youth justice reform: redressing age discrimination against children?

Simon Flacks

Correspondence: Simon Flacks, University of Vienna, Doctoral College 'Empowerment through Human Rights, Hörlgasse 6, 1090 Vienna, Austria.
E-mail: simon.flacks@univie.ac.at

Abstract

This article considers whether the system of reprimands and final warnings in the youth justice system in England and Wales constitutes age discrimination for the purposes of human rights law. Whilst much youth justice discourse has addressed the use of diversionary measures that steer children away from formal justice processes, little attention has been paid to measures which negatively discriminate against children, in comparison to adults, without reasonable justification. The discussion contextualises the issue within discourses on the sociology of childhood and youth justice, and considers why there is a general reluctance to recognise children as 'victims' of age discrimination.

Key words: discrimination, diversion, human rights.

Introduction

After gaining power in the May 2010 parliamentary elections, the new British government, like many before it, wasted little time in signaling its commitment to review sentencing and rehabilitation policy in the criminal justice system and, in December 2010, published the Green Paper *Breaking the cycle: effective punishment, rehabilitation and sentencing of offenders* (Ministry of Justice, 2010). The government's response to the ensuing consultation outlined plans to "replace the current youth out-of-court disposals with a system of youth cautions, and youth conditional cautions, repeal youth penalty notices for disorder and promote informal restorative disposals" (Ministry of Justice, 2011: 9).

This article considers whether current out-of-court disposals, in particular reprimands and final warnings, discriminate against children. Age discrimination in respect of young people is an issue almost entirely neglected in both youth justice and child rights discourse.¹ Although diversionary measures that treat children more leniently than adults – measures which one might describe as *positive* discrimination – are now enshrined in international soft

¹ In this article, both 'children' and 'young people' refers to people under the age of 18.

law, and have formed the basis of a number of critical commentaries on the juvenile justice system in England and Wales and elsewhere, (see, for example, Kilkelly, 2008; Goldson and Muncie, 2009; Harmmarberg, 2009) there has been very little scrutiny of laws which may constitute *negative* discrimination on the basis of age. Where discussion has focused on the issue of discrimination specifically, it has mostly addressed unequal treatment *among* children and young people within the criminal justice system, in particular on the basis of gender and ‘race’ (Youth Justice Board, 2004), but not children and young people *per se*.

The right to non-discrimination is a well-established, if sometimes ill-defined, principle of human rights law. The relevant provisions, and their application, are discussed in more detail later in the article, but they include Article 14 of the European Court of Human Rights, and Article 2 of the Convention on the Rights of the Child. Various legal authorities, including UK courts, have held that age falls within the purview of such human rights provisions.² The discussion that follows is particularly pertinent because there have been increasing moves towards recognising age discrimination in legal provisions across Europe, for example in the Directive establishing a General Framework for Equal Treatment in Employment and Occupation ((2000) OJ L 303/16). However, the discourse has been dominated by discrimination as experienced by older people, particularly in respect of employment, and not by children and young people.³ Indeed, as explained later, children have been expressly excluded from civil age discrimination legislation in the UK.

This article begins by arguing that the use of reprimands and final warnings constitutes age discrimination, and considers the feasibility of bringing a case under European and domestic human rights law. It then discusses the importance of socio-legal understandings of childhood, discrimination and youth justice in arguing for greater recognition of the propensity towards age discrimination in the criminal justice system in general, notwithstanding the challenges such an approach holds. Although not blind to the limits of

² See, for example, *R (Smith) v Secretary of State for Defence and the Secretary of State for Work and Pensions (interested party)*, High Court, 26 July 2004, EWHC 1797.

³ This may to a large extent be a result of the dearth of children’s voices in public discourse, and the (related) dominance of ‘protection’ or ‘in need’ organisations among children’s charities and representative bodies. In contrast, older people’s organisations are represented and staffed by older people themselves, and are more rights focused. For example, the website for Age UK, the largest charity representing the rights of older people, deems age discrimination important enough to address on its homepage: <http://www.ageuk.org.uk/>. In contrast, the Child Rights Alliance for England (CRAE) which is dwarfed in size by the vast majority of children’s organisations in the UK, is the only such organisation to expressly refer to age discrimination on its website: www.crae.org.uk.

non-discrimination law in addressing social inequality, it concludes by arguing that scrutinising criminal justice policies with age discrimination in mind could constitute a useful means for challenging overly punitive youth justice measures, and that viewing childhood as a site of potential discrimination on the basis of age, could prove helpful in addressing young people's marginalisation.

Reprimands and final warnings: examples of age discrimination?

Section 65 of the Crime and Disorder Act 1998 (CDA) introduced reprimands and final warnings into the youth justice system, and these are among the provisions that the government has recently indicated it plans to replace. These measures were introduced because of perceptions that the previous 'caution' system was too soft on juvenile offenders, and that it allowed too much scope for the repetition of offending behaviour without the juvenile being suitably sanctioned (Bateman 2002). Following a reprimand, any further offence leads to a final warning or charge. Final warnings are issued when an offender has previously been handed one caution or reprimand, or has not received either but the gravity of the offence is deemed to warrant a more serious intervention. A young offender will normally receive only one final warning unless two years have elapsed since the imposition of the initial warning (CDA, s.65). As such, the final warning scheme restricts the number of times young people can be diverted from court and "creates a clear presumption in favour of prosecuting a young offender who has previously been reprimanded and warned" (Koffman and Dingwall 2007: not page numbered). In the previous system of cautioning, there was less of an emphasis on, and requirement to engage in, rehabilitative and compulsory measures in order to avoid prosecution. Indeed, the CDA places statutory obligations on the police and Youth Offending Teams (YOTs) to provide, or assist in providing, rehabilitative interventions at the final warning stage (Fox et al., 2006). Following automatic referral, the YOT conducts an assessment of the 'risk' that the young person poses to themselves and the public at large using an 'Asset' – a standard tool which involves scoring the young person according to various identified 'risk' categories. According to Koffman and Dingwall: "A problem with the new presumption that a young offender will be considered for a rehabilitative programme is that this will frequently be too severe a consequence for a relatively minor offence" (2007: not page numbered).

Reprimands and Warnings are recorded on the Police National Computer, remaining there for five years, and form part of a criminal record. They are also included in both standard and enhanced criminal record searches (Release, 2010). Moreover, they are also cited in court hearings when a young person appears on a charge, while compliance or non-compliance with a final warning programme is included in YOT court reports (Fox et al., 2006). If a child commits a further offence within two years of a final warning, he or she is prevented from receiving a conditional discharge. Lady Hale, in the House of Lords case of *R v Durham Police and another, ex parte R* ([2005] UKHL 2) (the *Durham Constabulary* case), emphasised that “reprimands and final warnings do carry consequences... they amount to a considerable modification of the child’s legal status” (paragraph 45). Liberty, a human rights organisation, has argued that such a “two-step system” is:

“inflexible and unjust. It tie[s] the hands of police officers, preventing them from making reasoned judgments on a case-by-case basis about how best to deal with young people with whom they [come] into contact. It act[s] as a funnel, channelling young people into the criminal justice system and removing the option of informal intervention as a way of tackling low-level offending” (Liberty, 2009: 3).

Alongside these criticisms, there are two means by which age discrimination arguments may be invoked. First, adults are subject to warnings for which there are less punitive consequences. Say two people were stopped in different geographical locations, one aged 17 and one aged 18, twice in the same period for unrelated low-level offenses, such as minor vandalism and then cannabis possession. It is most likely that the 18-year-old would be handed a (adult) caution on each occasion (Home Office, 2008), whilst the 17-year-old would be issued with a reprimand (ACPO, 2009). But while it is likely that the adult would be sent on her way with the second warning simply recorded on a police database, the police officer would be compelled to issue the youth with either a final warning or a charge – with all the ensuing legal consequences.⁴ In other words, the same offences, under the same circumstances for two people with comparable recent arrest histories, would likely result in harsher treatment for the 17-year-old compared with the 18-year-old. This raises questions

⁴ In fact, guidance issued by the Association of Chief Police Officers on dealing with those detained for possession cannabis for personal use considers what an officer should do if a 17-year-old and a 19 year-old are smoking cannabis together. The guidance says: “Officers may have to deal with them differently i.e Arrest one (17 years) and warn the other (19 years)” (ACPO, 2009: 11).

under, for example, article 14 of the European Convention on Human Rights, as implemented in the UK via the Human Rights Act 1998.

Second, it has already been argued that the final warning process violates the right to due process since the accused do not have to consent to the warning,⁵ and are unable to contest the evidence (Gillespie, 2005). In contrast, adults must give informed consent in order for a caution to be issued (Home Office, 2008). Such a difference in treatment, it is suggested, amounts to age discrimination and this second argument will be addressed before returning to the first, more general proposition, that the use of reprimands and final warnings is itself discriminatory.

The feasibility of a claim under article 14

In the *Durham Constabulary* case, a challenge to the legality of the consent issue was rejected by the House of Lords, and it is submitted that a discrimination claim could also have been brought under article 14. A 15 year old boy was given a reprimand for behaving in a sexually inappropriate manner towards girls at his school. However, he was not informed that, under Part 1 of the Sex Offenders Act 1997, a reprimand required his listing on a sex offenders' register. R claimed that the procedure breached Article 6 of the European Convention on Human Rights (the right to a fair trial). The House of Lords rejected the claim, with Lord Bingham questioning whether Article 6 was invoked at any stage during the process, but particularly arguing that, even if engaged at the beginning, it ceased to be of relevance once the police decided not to prosecute because there was no longer a criminal charge (paragraph 12). Gillespie (2005) has persuasively rejected this argument, noting that the administration of a reprimand has considerable legal effects for the offender, and thereby constitutes a criminal charge that will be included on his/her criminal record and, in this case, on the sexual offences register. Moreover, he notes that the power to issue the reprimand without reference to the Crown Prosecution Service leads to the possibility that it may be imposed in circumstances where the evidence could be insufficient. Gillespie further notes that an admission of guilt is necessary for the issue of a reprimand, yet the scope and substance of an admission is not clear (Evans and Puech, 2001; Gillespie, 2005). Finally, and most importantly for the purposes of this discussion, in respect of consent, Gillespie refers to

⁵ The *Crime and Disorder Act 1998* is silent on the issue of consent for reprimands.

the United Nations Convention on the Rights of the Child (UNCRC) (Article 40(3)(b)) and Rule 11.3 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the *Beijing Rules*) that require the consent of the juvenile or her or his parents to any “diversion involving referral to appropriate community or other services”. Gillespie concludes: “Accordingly Lady Hale could, and should, have decided that the right to a fair trial includes a consideration of the UNCRC and ruled that diversion from formal criminal procedures without consent infringes the right to fair trial through a denial of due process” (2005: 1014).

Besides the arguments concerning the right to fair trial, it is feasible that a discrimination claim on the grounds of age, under article 14 of the European Convention, could have been lodged in conjunction with Article 6 since, for the equivalent charge (a caution), informed consent may be required for adults but not for children. Article 14 is violated when a State Party treats persons in analogous situations differently without providing objective and reasonable justification; or when, without objective and reasonable justification, it fails to treat differently persons whose situations are significantly different (*Thlimmenos v. Greece* (2001) 31 EHRR 15). It is pertinent to note, and this is also important in respect of the possibility for claiming that the existence of a different and more punitive system for juveniles may in itself be discriminatory (discussed further below), that Article 14 is not an independent equality right. It only gives protection from discrimination in relation to the enjoyment of the other rights in the Convention. As such, a discrimination claim will only be considered under Article 14 if any difference of treatment falls within the scope of another Convention right. As indicated earlier, the European Court of Human Rights (ECtHR) has held that ‘age’ is included among ‘other status’ under Article 14 (ECtHR, *Schwizgebel v. Switzerland* (No. 25762/07), 10 June 2010). Protocol 12 to the Convention, which introduces a substantive equality clause into the Convention, and which was opened for signature in November 2000, can be invoked independently of other Convention rights – unlike article 14 – but it has not been ratified by the UK.

However, it is arguable that a claim under Article 14 could nonetheless have theoretically succeeded in the *Durham Constabulary* case. If the Court holds that a substantive right has been violated, it will often not go on to consider the grounds for discrimination under Article 14 if this involves scrutinising what is, essentially, the same complaint. But the Court has also held that it may examine claims under Article 14 taken in conjunction with a substantive

right, *even if there has been no violation of the substantive right itself*.⁶ This raises the possibility that, even if there was held to be no violation of Article 6, a claim under article 14 might nevertheless be considered by the Court.

Moreover, the Court has decided cases where there has been an *imputation* of age discrimination in the context of children and crime. In *T. v. UK* and *V. v. UK* (ECtHR, *T. v. UK* [GC] (No. 24724/94), 16 December 1999; *V. v. UK* [GC] (No. 24888/94), 16 December 1999) two boys - who had been found guilty of a murder committed when they were 10 years old - argued that they had not been given a fair trial because their age and lack of maturity meant they could not participate “effectively” in their defence; again a right guaranteed under Article 6 of the Convention. The Court held that a State must take “full account of [the child’s] age, level of maturity and intellectual and emotional capacities” and take steps “to promote his ability to understand and participate in the proceedings” (Fundamental Rights Agency, 2011: 103). It concluded that there had been a violation of Article 6, although it did not expressly examine the case from the perspective of Article 14. In *D.G. v. Ireland* and *Bouamar v. Belgium* (ECtHR, *D.G. v. Ireland* (No. 39474/98), 16 May 2002; ECtHR, *Bouamar v. Belgium* (No. 9106/80), 29 February 1988) the applicants had been placed in detention, which the Court ruled amounted to arbitrary detention. The applicants had also claimed that the treatment was discriminatory because national law dictated that adults could not be deprived of their liberty in such circumstances. The Court concluded that there had been no violation of Article 14 in respect of the alleged difference in treatment, but it did not dismiss the claim. It instead held that the justification test for discrimination under Article 14 failed.

The justification test

Beyond the feasibility of bringing an age discrimination claim, the ‘reasonable and objective’ justification test would also need to be passed. This test follows the seminal ruling on proportionality in the context of discrimination and Article 14 at the ECtHR in the Court, in the *Belgian Linguistic Cases*, (Nos. 1 & 2), ((No.1) (1967), Series A, No.5 (1979-80) 1 EHRR 241 (No.2) (1968), Series A, No.6 (1979-80) 1 EHRR 252). The Court held: “A difference in treatment is discriminatory if it has no reasonable justification: that is if it does not pursue a legitimate aim, or there is not a reasonable relationship of proportionality

⁶ See, for example, *Sommerfeld v. Germany* [GC] (No. 31871/96), ECtHR 8 July 2003.

between the means employed and the aim sought to be realized” (paragraph 33).

Fredman (2003) observes that human rights treaties use “open-ended notions of equality,” which require the courts to “create principles for distinguishing legitimate from illegitimate instance[s] of unequal treatment” (2003: 59). A means test is thus deployed to differentiate between acceptable and unacceptable forms of discrimination. If the differential treatment is proportionate, “the court must be satisfied that there is no other means of achieving that aim that imposes less of an interference with the right to equal treatment. In other words, the disadvantage suffered must be the minimum possible level of harm needed to achieve the aim sought” and that “the aim to be achieved is important enough to justify this level of interference” (Fundamental Rights Agency, 2011: 45).

In *D.G. v. Ireland* and *Bouamar v. Belgium*, the Court ruled that, even if there was a difference in treatment between adults and children, such measures would be justified. According to the judgment:

“...even assuming that there would be a difference in treatment between minors requiring containment and education and adults with the same requirements, any such difference in treatment would not be discriminatory stemming as it does from the protective regime which is applied through the courts to minors in the applicant's position. In the Court's view, there is accordingly an objective and reasonable justification for any such difference of treatment...”

The important question, then, is how far does such a ‘protective regime’ go? To what extent can this justify measures that may have been instigated in the name of protection, but that result in harsher, harmful penalties for juveniles? Are the regimes of reprimands and final warnings, and the differential attribution of due process for adults and under-18s, ‘objective and reasonable’?

Assuming Gillespie (2005) is correct in his assertion that the reprimand does amount to a criminal charge, the denial of a right to a fair trial for children arrested on minor drug charges should not be considered proportionate. A challenge to the assertion of a legitimate aim usually fails, since “it is only rarely that measures are completely irrational, and it is always possible to argue that they are suitable and necessary to accomplish a legitimate aim.” As

such, the proportionality test is invariably reduced to “measuring the relative intensity of the interference with the importance of the aim sought” (Tsakyrakis, 2009: 468). In this case, the government might, for example, argue that differential treatment is necessary because the purpose of the reprimand system is to divert young people from court, and the requirement of consent may impede the swift disbursement of such action. Or perhaps law makers were simply concerned about issues of consent and capacity in respect of children and young people, and how to ensure that the given consent is legally valid. It is of limited use to examine the force of speculative arguments, but it is submitted that the importance of this aim, and the availability of less restrictive measures (depending on the arguments for the discriminatory measure put forward) such as, for example, police guidance on ensuring consent given by juveniles is informed, would not justify such a serious interference. Once again, we can only speculate, but swift justice and avoiding legal complications in issues of consent are hardly good grounds for discriminatory treatment. The Court has in the past emphasised the “prominent place” of the corollary right, Article 6, within a democratic society, and has advocated an expansive interpretation of the provision.⁷ It has, furthermore, taken the view that any suggestion that children should not benefit from the fair trial guarantees of Article 6 is “unacceptable.”⁸

As discussed earlier, although it may be reasonable to argue that the system of reprimands and final warnings is itself discriminatory - because it restricts the number of times juveniles can be diverted from court, in contrast to the system applied to adults - such a claim could not be brought independently in either domestic or European courts because Article 14 is to be used only in conjunction with the alleged interference of another right (notwithstanding the creative way in which the Court has interpreted this, discussed above). Sandra Fredman (2002), among others, has argued persuasively that the UK should ratify Protocol 12, providing for an independent equality right, but given the coalition government’s antipathy towards human rights in general, it is unlikely that this will occur for some time, if at all.⁹ However, it is instructive to consider whether the justification test would be passed were Protocol 12 to be ratified in the future – and this may be of particular relevance for other

⁷ *Delcourt v. Belgium*, 17 January 1970, para. 25.

⁸ *Nortier v. the Netherlands*, Commission Report 9 July 1992, Appl. No. 13924/88, para. 60.

⁹ The Conservatives had wanted to replace the Human Rights Act 1998 with a UK Bill of Rights, and largely rejected a European Court of Human Rights ruling on giving prisoners the vote in February 2011. See, for example, David Cameron: UK human rights law review 'imminent', *BBC news* online, 16 Feb 2011, at: <http://www.bbc.co.uk/news/uk-politics-12482442>.

European States that have already ratified. It would, in such circumstances, not be difficult to argue that there was a legitimate aim. The State might well probably argue, for example, that the 'diversionary' measures (discussed further below) were devised in order to intervene early and, ideally, rehabilitate. But would such measures be proportionate, given the consequences for the criminal records of children and young people and the dangers of being 'inducted' into the criminal justice system? After all, although the goal of reprimands and final warnings may be to intervene at an early stage to interrupt a young person's potential 'criminal career', and to divert them away from court, research has in fact linked 'labelling' to the entrenchment of 'criminal careers'. Koffman and Dingwall, for example, note: "It is believed that the majority of young offenders will attain greater maturity eventually and outgrow their law-breaking, if they are not adversely 'labelled' and confirmed in their criminal identities" (2007: not page numbered). Evidence from a confidential survey where young people self-reported their offending showed that once young people had been warned or charged they were much more likely to be arrested again than those who committed similar offences, but were still unknown to the police (McAra and McVie, 2005). Barry Goldson (2011) has noted, moreover, that theoretical critiques of intervention in youth justice are informed by interactionist, social reaction and labelling perspectives that question the common sense assumption that early intervention serves to offset future offending. Although the system of reprimands and warnings may have been devised in order to divert juveniles from court, if such a system works to their detriment, criminalising and labeling children and young people for offences for which adults would be diverted entirely from court, then it constitutes discriminatory treatment which has no reasonable justification. Of course, it may be difficult to determine the effect of perhaps well-meaning - even if misguided - youth justice measures in advance, but this example demonstrates the importance of research that scrutinises all the social and personal consequences of seemingly welcome, commonsensical 'diversionary' measures.

Returning once again to the feasibility, rather than the substance, of such cases, success at the European Court in practice would not be easy given the political context in which cases are assessed. States have been afforded a considerable degree of discretion in developing policies and practices based on national cultures and traditions, reflecting anxiety over too much interference with Member State sovereignty. The Court has developed the doctrine of the 'margin of appreciation', which indicates the extent to which the State has discretion in

determining whether differential treatment is justified within its borders. In this way, the Court is:

“less likely to accept differential treatment where this relates to matters considered to be at the core of personal dignity – such as discrimination based on race or ethnic origin, home, or private and family life – and more likely to accept differential treatment where this relates to broader social policy considerations, particularly where these have fiscal implications.” (Fundamental Rights Agency, 2011: 45).

But this does not preclude the argument that such claims have merit, and that considering youth justice provisions in the context of age discrimination could prove useful, whether in court or in campaigning for legal reform.¹⁰

The exclusion of children from civil discrimination legislation

It is perhaps unsurprising that age discrimination has barely featured in youth justice discourse. Discriminatory youth justice provisions are enacted within a broader social context in which children in the UK experience considerable marginalisation, and yet are afforded no protection from age discrimination outside of the criminal sphere. The United Nations Committee on the Rights of the Child has voiced its concern at the:

“general climate of intolerance and negative public attitudes towards children, especially adolescents, which appears to exist in the State party, including in the media, and may be often the underlying cause of further infringements of their rights” (CRC, 2008: 6).

¹⁰ It is worth noting that some might fear that adults could themselves launch claims for discrimination on the basis that children are dealt with more leniently through diversionary measures. But it would not be difficult to justify such measures on the basis that children’s evolving capacities and possible diminished decision-making capability, as well as the desire to avert criminally labeling and so on, would render such differential treatment reasonable and proportionate.

The report went on to identify a means for going some way towards redressing such negative and stigmatising attitudes:

“The Committee welcomes the State party’s plans to consolidate and strengthen equality legislation, with clear opportunities to mainstream children’s right to non-discrimination into the UK anti-discrimination law (forthcoming Equality Bill)” (ibid).

But UK children’s rights advocates, as well as a clutch of parliamentarians, were dismayed in 2009 by the refusal of the UK government to legislate for discrimination against children in the draft Equality Bill as identified by the Committee, despite lobbying from national legal and child rights experts. Among other purposes, an aim of the Bill was to extend age discrimination protection beyond the workplace, to cover the provision of goods, facilities and services – yet the resultant Act does not apply to persons below the age of 18 in this respect (Equality Act 2010, s. 28(1)(a)). Harriet Harman, the Leader of the House of Commons at the time, told MPs: “The provisions will not cover people under 18. It is right to treat children and young people differently... and there is little evidence of harmful age discrimination against young people.”¹¹ Yet submissions to the consultation that preceded the enactment of the Bill suggested otherwise.

A report by the UK Joint Committee on Human Rights (JCHR), comprising representatives from both the House of Commons and House of Lords, argued that:

“the total absence of protection against age discrimination for those under 18 in service provision... means that children who are subject to unjustified discrimination are left with little or no legal protection” (JCHR, 2009: 23).

An organisation, Young Equals, set up to specifically campaign for protection from age discrimination for children and young people, and composed of organisations including Liberty and Save the Children, launched a publication called, *Making the Case*, including a

¹¹ Davies C. ‘Discrimination “a fact of life for British children”’, *The Guardian*, 29 March 2009

dossier of evidence of age discrimination against children and young people (Young Equals, 2009). The report notes:

“Research reveals a pattern of behaviour under which older children, usually (but not solely) aged 16 and 17, receive less favourable treatment from health services than adults or younger children, either due to a complete lack of services or to a lack of age-appropriate service provision.” (Young Equals, 2009: 8).

A government inspectors’ report concluded that ‘young people aged 16–18 with a mental health condition or a chronic illness’ received ‘insufficient priority’ by children’s health and social care services (Ofsted, 2005: 7). Young Equals also cited reports from the government Social Exclusion Unit and the British Medical Association, with the former concluding that:

“‘age boundaries’ between services have a particularly negative impact on children (especially those who are most disadvantaged). The report found ‘little consistency or continuity’ between services and few mental health services dealing with children aged 16 and above, so that ‘some ...find that at 17 they are having difficulty getting any mental health support at all’. Substance misuse services for older children are found to be ‘under resourced and marginalised’.”

The latter, meanwhile, “criticised a lack of mental health services for adolescents and poorly developed services for teenagers in need of treatment for smoking, drinking and drug addiction” (Young Equals, 2009: 8).

However, in response, the government Equality Office claimed that:

“The vast majority of examples submitted as evidence would already be covered by existing human rights legislation, existing domestic discrimination legislation or more thoroughly dealt with through public sector duties.... it is almost always right to treat children of different ages in a way which is appropriate to their particular stage of development. Any such legislation would require a large number of exceptions to ensure, for example, that a child of a particular age could not insist on the same treatment as an older (or younger) child or adult, or an adult claim the same treatment as a child” (UK Government Equalities Office, 2010: 25).

The government also stated that it was concerned that “certain age-based services for children could be withdrawn by service providers in the mistaken belief that they were no longer lawful; or the law might be used as a convenient excuse to withdraw services that would have been withdrawn anyway” (ibid.).

But it is rather difficult to believe that service providers working in the interest of their clients would withdraw services without consulting professionals with knowledge of the Equality Bill’s implications. If they did, they would discover that the Equality Act introduces a justification test, which states that the service provider has a defence if it can show its conduct is a 'proportionate means of achieving a legitimate aim' (s.13(2)). A parallel test in the context of European law was discussed earlier, and it would be possible to show that the provider could only provide services to a certain age group because of, say, the specific needs of that group and limited resources to cater to all ages. Indeed, the justification clause would neglect the need for “a large number of exceptions”, which would presumably not need to be invoked any more than for older people. Furthermore, existing human rights legislation is not currently protecting young people - in respect of the examples submitted - any more than it is protecting older people.

Socio-political barriers to recognising age discrimination for children

The sociology of childhood has been the focus of substantial scholarship, particularly over the last 30 or so years, and it is bound up with variable understandings of children’s rights, and with approaches to youth justice. Until this time, “[t]he limited way in which mainstream sociology looked at children had shaped a research agenda which was primarily concerned with questions of why children fail to become the right kind of adult” (Moran-Ellis, 2010:187). In this conceptual framework, children are essentially different from, and by definition set up in opposition to, adults. Various authors have since called for, and engaged in, research that concerns children as social actors, and not merely objects of study, or future adults (see, for example Alderson, 2000; Lansdown, 1995). Politically, children have historically been the subject of scrutiny, viewed invariably as either - and/or both - vulnerable innocents in need of protection and/or potentially deviant beings requiring surveillance and

control (see, for example, Goldson, 2004; Piper, 2005; James and Prout, 1997; Moran-Ellis, 2010) According to Rose “childhood is the most intensively governed sector of personal existence” (1989: 121).

Discrimination sits uneasily with images of childhood in which children as objects are depicted as either innocent and vulnerable (‘needing’ welfare), or dangerous and criminal (‘needing’ discipline and ‘deserving’ punishment) (Goldson, 2000). An understanding of children as agency-bearing rights-holders challenges romanticised, idealised, or pathological notions of childhood. The fact that, in England and Wales children are deemed criminally responsible at the age of 10, but cannot enjoy protection from age discrimination at any age, is indicative of an attitude to children that affords them specific variants of active agency when conceptualized as ‘threats’, but denies them similar levels of agency when they are deemed to constitute ‘victims’. In this sense, children must be protected and cosseted, but asserting power (either when offending or claiming parity) threatens the adult-child relationship and hence the social order.

Perhaps the most obvious example of invidious and yet broadly condoned discrimination against children is the continued state-endorsed deployment of corporal punishment in the home. The prevailing view on ‘smacking’ is that low-level violence may be in the best interests of the child, or dispersed for the child’s ‘own good’.¹² All adults have the right to be free from physical assault under the criminal law, yet domestic law allows children to be ‘reasonably chastised’,¹³ although the European Court of Human Rights has ruled that the existence of this defence violates Article 3 of the European Convention on Human Rights and the child’s right to be protected from torture and inhuman and degrading treatment. Michael Freeman (1996: 100) argues that: “Nothing is a clearer statement of the position that children occupy in society, nor a clearer badge of childhood, than the fact that children are the only members of society who can be hit with impunity”. Fredman (2003: 35) has framed the refusal of successive governments to outlaw the corporal punishment of children in the home, which is “difficult to reconcile with the rights of children and young people to physical integrity and liberty,” within the context of age discrimination, although the European Court of Human Rights did not address issues under Article 14 when it has made rulings on such

¹² See, for example, Martin D. (2010) Young children who are smacked ‘go on to be more successful. *Daily Mail*, 4 January 2010, accessible at: <http://www.dailymail.co.uk/news/article-1240279/Children-smacked-young-likely-successful-study-finds.html>

¹³ See Children and Young Person’s Act 1933 s.1(7) and, for the reasonableness test, *H* [2002] 1 Cr App R 59.

claims.¹⁴ Correspondingly, criminologists in the fields of youth justice were historically preoccupied with the question of how and why boys “do crime”. Richard Collier (1998: 72) writes that the “association between boys, young men and crime has itself been rendered inseparable from the interrelated histories of the criminal justice system, penal policy and criminological theory” .

In this socio-political context, arguing for the recognition of age discrimination in youth justice policy, never mind civil law, presents formidable challenges. Recent domestic policy does not support international consensus on children’s rights in youth justice, and both reproduces and reflects these social constructions of childhood. It is a generally accepted principle of the criminal law, as well as youth justice policy, that children and young people should be afforded more lenient treatment by virtue of their diminished age and maturity.¹⁵ ‘Diversion’, which denotes the measures deployed to prevent the processing of offenders through formal criminal justice processes like prosecution, trial and sentence, has been commonly supported as a means for dealing with juvenile offenders when the offences are considered to be minor.¹⁶ The *Beijing Rules* invoke this principle in Rule 11, and the United Nations Committee on the Rights of the Child has repeatedly emphasised its importance. Non child-specific international legal instruments also include clauses designed to protect children within the criminal justice system. Thus Article 6, paragraph 5, of the International Covenant on Civil and Political Rights prohibits the death sentence from being imposed on persons below 18 years of age and article 10, paragraph 3, requires the separation of juvenile offenders from adults (Human Rights Committee, 1994: para. 8). The Beijing Rules also stipulate in section 5 that: “The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.”

¹⁴ See, for example, the case of *A. v. UK* (100/1997/884/1096)

¹⁵ For example, Lord Bingham, in *R v Durham Police and another, ex parte R* [2005] UKHL 2, 373, noted that: “[It] has long been recognised as undesirable in many cases for young offenders to be drawn into the process of the criminal courts...unless this is really necessary.” Cited in Dingwall and Koffman (2006: 488).

¹⁶ ‘Diversion’ itself has been critiqued on the basis that, in spite of its ubiquity, its meaning is ill-defined. Dingwall and Harding argue that: “‘Diversion’ may be an appropriate description of what happens to those offenders for whom there is a conscious decision not to use the formal process of prosecution and trial in cases where there is a fair expectation that it would otherwise have taken place. But it is less properly applied to convey the idea of what happens to those offenders who are customarily and as a matter of principle dealt with outside the conventional parameters of formal criminal justice, for instance by non-State agencies or by non-repressive procedures and measures. “Diversion” begs the question of the norm: from what is the offender being diverted?” (1998:1).

But much academic analysis has scrutinised the last UK Labour government's preoccupation with youth criminality, and its distancing from international rights consensus, because, it is argued, of its efforts to avoid being seen as lenient on juvenile crime (see, for example, Koffman and Dingwall, 2006, Kemshall, 2008, Kelly, 2001, Goldson, 2000, Muncie, 2006, Scruton and Haydon, 2002). It is often asserted that the number of children in custody in England and Wales has climbed to the highest in Europe (Goldson 2005). Section 37(1) of the Crime and Disorder Act 1998 states that the principal aim of the youth justice system is to prevent offending, including reoffending, by children and young people. The Criminal Justice and Immigration Act 2008 (CJIA) reinforces this principle. While the welfare of the offender, and other factors, must be taken into consideration, these must be subordinate to the principal aim of youth justice – to prevent offending and reoffending. In this way, Arthur (2008: 1117) argues that the “welfare of the child is unavoidably degraded from its historically secured place as the paramount consideration to a marginal concern”. Indeed, the CDA 1998 as a whole has been described as “punitive and controlling in principle and in practice,” and providing a framework in which crime control takes precedence over due process (Puech and Evans 2001: 804). The apparent primacy of the reoffending principle reflects the dominant discourse on childhood and criminality in England and Wales, portraying childhood as a period of ‘dangerous tendencies’ which must be curtailed in order to produce socially acceptable adults (Collier 1998).

These comments are reflected in the admonishments of the United Nations Committee on the Rights of the Child (CRC), which in 2008 stated that: “the principle of the best interests of the child is still not reflected as a primary consideration in all legislative and policy matters affecting children, especially in the area of juvenile justice, immigration and freedom of movement and peaceful assembly” (CRC, 2008: paragraph 26). Youth justice policy in England and Wales, as in many other countries, also falls hardest on those from the poorest and most marginalised backgrounds. Goldson (2010: 164) writes:

“[e]xcessive reliance on youth justice systems to ‘manage’ profound contradictions in the social order is shown to be both ethically unsustainable and practically counter-productive. On the one hand it amounts to the criminalisation of social need and the intensification of social injustice. On the other hand, as noted, it is a spectacularly

ineffective strategy when measured in terms of crime prevention and community safety and it often serves to exacerbate the very problems that it ostensibly aims to resolve.”

The fact that age discrimination is such a marginal issue is perhaps not surprising given this wider policy context. Moreover, a further impediment to recognising age discrimination, and indeed an impediment to bringing children’s rights claims in general, is the limited number of children who are able or willing to challenge discriminatory measures both inside and outside of court, and the apparent shortage of lawyers who may be willing to take on such cases. It is particularly difficult to imagine that many children, particularly when those most at risk of discriminatory criminal treatment are likely to come from disadvantaged backgrounds - further diminishing their economic, social and political capital - would conceive of themselves as ‘rights-holders’ and therefore deserving of redress.

The question of whether the discriminatory treatment of children is justified in certain circumstances would likely be highly contentious. There are situations in which children must be granted preferential, and therefore differential, treatment for their benefit. Indeed, this is, as discussed earlier, the rationale for ‘diversionary’ measures. Furthermore, few would disagree with the principle that children should, say, benefit from extra safeguards against sexual exploitation because of their specific vulnerability in respect of capacity and consent. On the other hand, when does different treatment unjustifiably interfere with a child’s rights? Fredman (2003: 33) writes that:

“The use of age as an approximation of capacity for children and young people raises different issues from those of older people, since decision-making capacity is developing. A difficult and challenging balance needs to be struck between independence and participation on the one hand, and protection of the child’s interests on the other”.

There are no easy answers to this broader dilemma, and there are considerable challenges to recognising children as victims of age discrimination, but it has been argued here that this balance has not been struck in respect of some out-of-court youth justice disposals currently in place in England and Wales. While it is a given that children should be afforded some

protection by virtue of their diminished responsibility and capacity, it is time to pay closer attention to the ways in which they experience negative discrimination on the basis of age, and the extent to which this is legitimised simply because of their status as children.

Conclusion

As well as the socio-political barriers to the recognition of children as victims of age discrimination, critical legal scholars have questioned attempts to seek social, political or economic parity via the law. Nancy Fraser (1995), for example, insists that *affirmative* solutions that recognise rights or identity claims fail to transform underlying inequalities because they are predicated on subordination to the (for our purposes, intrinsically *ageist*) statutory framework. On the other hand, she argues, truly *transformative* solutions must in same way overcome or destabilise existing structures. Nonetheless, given how young people have been increasingly problematised and criminalised in the UK, despite increasing recognition of the rights of children and young people, framing punitive and repressive policies within the context of age discrimination could prove fruitful for challenging harmful youth justice policies. The erroneous claim that young people commit more crime than adults should certainly not be deployed as reason for punitive youth justice policies any more than any other marginalised social groups. In addition to the implications for law and policy, it is hoped this discussion might prompt further theoretical investigation and empirical research into the issue. ‘Anti-social’ behaviour measures, also the subject of a review (Home Office, 2011), police stop and search practices and the use of dispersal orders against children are ripe for analysis, while theoretical approaches might consider the implications for identity politics and legal theory addressing responsibility. While the UK government has signaled its intention to replace the current system of discriminatory measures, it is important to consider whether and how the proposed new system of cautions, or indeed other youth justice measures and practices, discriminate on the basis of age.

References

Association of Chief Police Officers (ACPO) (2009) *Guidance on Cannabis Possession for Personal Use*. London: Association of Chief Police Officer of England, Wales and Northern Ireland.

- Alderson P (2000) *Young Children's Rights*. London: Jessica Kingsley.
- Arthur R (2008) Demise of Welfare Considerations in the Youth Justice System: The Criminal Justice and Immigration Act 2008. *Family Law* 38: 1117-1120.
- Bateman T (2002) Living with Final Warnings: Making the best of a bad job? *Youth Justice* 2: 131-140.
- Collier R (1998) *Masculinities, Crime and Criminology*. London: Sage.
- Dingwall G, Harding C (1998) *Diversion in the Criminal Process*. London: Sweet and Maxwell.
- Drakeford M (2010) Devolution and youth justice in Wales. *Criminology and Criminal Justice* 10(2), 137-154.
- Evans R, Puech K (2001) Reprimands and Warnings: Populist Punitiveness or Restorative Justice? *Criminal Law Review*, 794-805.
- European Agency for Fundamental Rights Agency (2011) *Handbook on European non-discrimination law*. Luxembourg: Publications Office of the European Union.
- Fox D, Dhami M. K, Mantle G (2006) Restorative final warnings: Policy and practice. *Howard Journal of Criminal Justice* 45: 129-140.
- Fraser N (1995) From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age. *New Left Review* 212: 68-93.
- Fredman S (2002) Why the UK government should sign and ratify Protocol 12. *Equal Opportunities Review* 105.
- Fredman S (2003) The Age of Equality. In: Fredman S, Spencer S *Age as an Equality Issue*, Oxford: Hart.
- Freeman M (1996) The Convention: An English Perspective. In: Freeman M (ed), *Children's Rights: A Comparative Perspective*. Aldershot: Dartmouth.
- Gillespie A (2005) Reprimanding Juveniles and the Right to Due Process. *The Modern Law Review* 68: 1006-1015.

Goldson B (2000) 'Children in Need' or 'Young Offenders'? Hardening Ideology, Organizational Change and New Challenges for Social Work with Children in Trouble. *Child and Family Social Work* 5: 255–65.

Goldson, B. (2004) 'Victims or Threats? Children, Care and Control', in J. Fink (ed) *Care: Personal Lives and Social Policy*. Bristol: The Policy Press in association with The Open University.

Goldson B (2005) Taking Liberties: Policy and the Punitive Turn. In: Hendrick H (ed.) *Children and Social Policy: An Essential Reader*. Bristol: Policy Press.

Goldson B, Muncie J (eds) (2009) *Editors' Introduction: Youth Crime and Juvenile Justice*, Volume 3 - 'Children's Rights and State Responsibilities', Sage Library of Criminology. London: Sage.

Goldson B (2010) The sleep of (criminological) reason: Knowledge-policy rupture and New Labour's youth justice legacy. *Criminology and Criminal Justice* 10(2): 155-178.

Goldson B (2011) Time for a Fresh Start', but is this it? A Critical Assessment of The Report of the Independent Commission on Youth Crime and Antisocial Behaviour. *Youth Justice* 11(3): 3-27.

Hammarberg T (2009) *Children and Juvenile Justice: Proposals for Improvements*. Strasbourg: Council of Europe Commissioner for Human Rights.

Home Office (2008) *Home Office circular 016 / 2008: Simple cautioning of adult offenders*. London: Office for Criminal Justice Reform Policy and Process.

Home Office (2011) *More Effective Responses to Anti-Social Behaviour*. London: Home Office.

James A, Prout A (eds.) (1997) *Constructing and Reconstructing Childhood*, 2nd edn. London: Routledge/Falmer.

Joint Committee on Human Rights (JCHR) (2009), *Legislative Scrutiny: Equality Bill, Twenty-sixth Report of Session 2009*. House of Lords and the House of Commons. London: The Stationery Office Limited.

Kelly P (2001) Youth at Risk: Processes of Individualisation and Responsibilisation in the Risk Society. *Discourse: Studies in the Cultural Politics of Education* 22(1): 23–33.

Kilkelly U (1999) *The Child and the European Convention on Human Rights*. Dartmouth: Ashgate.

Kilkelly U (2001) The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child. *Human Rights Quarterly* 23: 308–326.

Kilkelly U (2008) Youth Justice and Children's Rights: Measuring Compliance with International Standards. *Youth Justice* 8(3): 187–92.

Koffman L, Dingwall G (2007) The Diversion of Young Offenders: A Proportionate Response? *Web Journal of Current Legal Issues* 2.

Lansdown G (1995) *Taking Part: Children's Participation in Decision Making*. London: Institute for Public Policy Research.

Liberty (2009) *Liberty's response to the Department for Children, Schools and Families "Youth Conditional Caution Code of Practice for 16 and 17 Year Olds" Consultation Paper*. Liberty: London.

McAra L, McVie S. (2005) The usual suspects? Street life, young people and the police. *Criminal Justice* 5 (1): 5-36.

Ministry of Justice (2010) *Breaking the cycle: effective punishment, rehabilitation and sentencing of offenders*. Norwich: The Stationery Office.

Ministry of Justice (2011) *Breaking the cycle: government response*. Norwich: The Stationery Office.

Moran-Ellis J (2010) Reflections on the Sociology of Childhood in the UK. *Current Sociology* 58: 186-205.

Muncie J (2006) Governing Young People: Coherence and Contradiction in Contemporary Youth Justice. *Critical Social Policy* 26(4): 770–93.

Office for Standards in Education, Children's Services and Skills (Ofsted) (2005) *Joint Chief Inspectors. Safeguarding children. The second joint chief inspectors' report on arrangements to safeguard children*. London: Ofsted.

Release (2010) *Young People, Their Rights and the Law*. London: Release.

Rose N (1989) *Governing the Soul: The Shaping of the Private Self*. London: Routledge.

Scruton P, Haydon D (2002) Challenging the Criminalization of Children and Young People: Securing a Rights Based Agenda', in Muncie J, Hughes G, McLaughlin E (eds) *Youth Justice: Critical Readings*. London: SAGE.

UK Government Equalities Office (EO) (2010) *Equality Act 2010: Banning age discrimination in services, public functions and associations, Equality Impact Assessment*. London: Government Equalities Office.

United Nations Committee on the Rights of the Child (CRC) (2008) *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/4. Geneva: United Nations.

United Nations Human Rights Committee (1994) General Comment 18, Non-discrimination. In: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1. Geneva: United Nations.

Walsh C (2002) Curfews: No More Hanging Around. *Youth Justice*, 2 (70)2: 70-81.

Young Equals (YE) (2009) *Making the Case: Why children should be protected from age discrimination and how it can be done. Proposals for the Equality Bill*. London: Young Equals.

Youth Justice Board (2004) *Differences or Discrimination* London: Youth Justice Board for England and Wales.

Youth Justice Board (2010) *Youth Justice: the Scaled Approach: A framework for assessment and interventions*. London: Youth Justice Board for England and Wales.

Simon Flacks is a PhD fellow in socio-legal studies at the University of Vienna, Austria.
